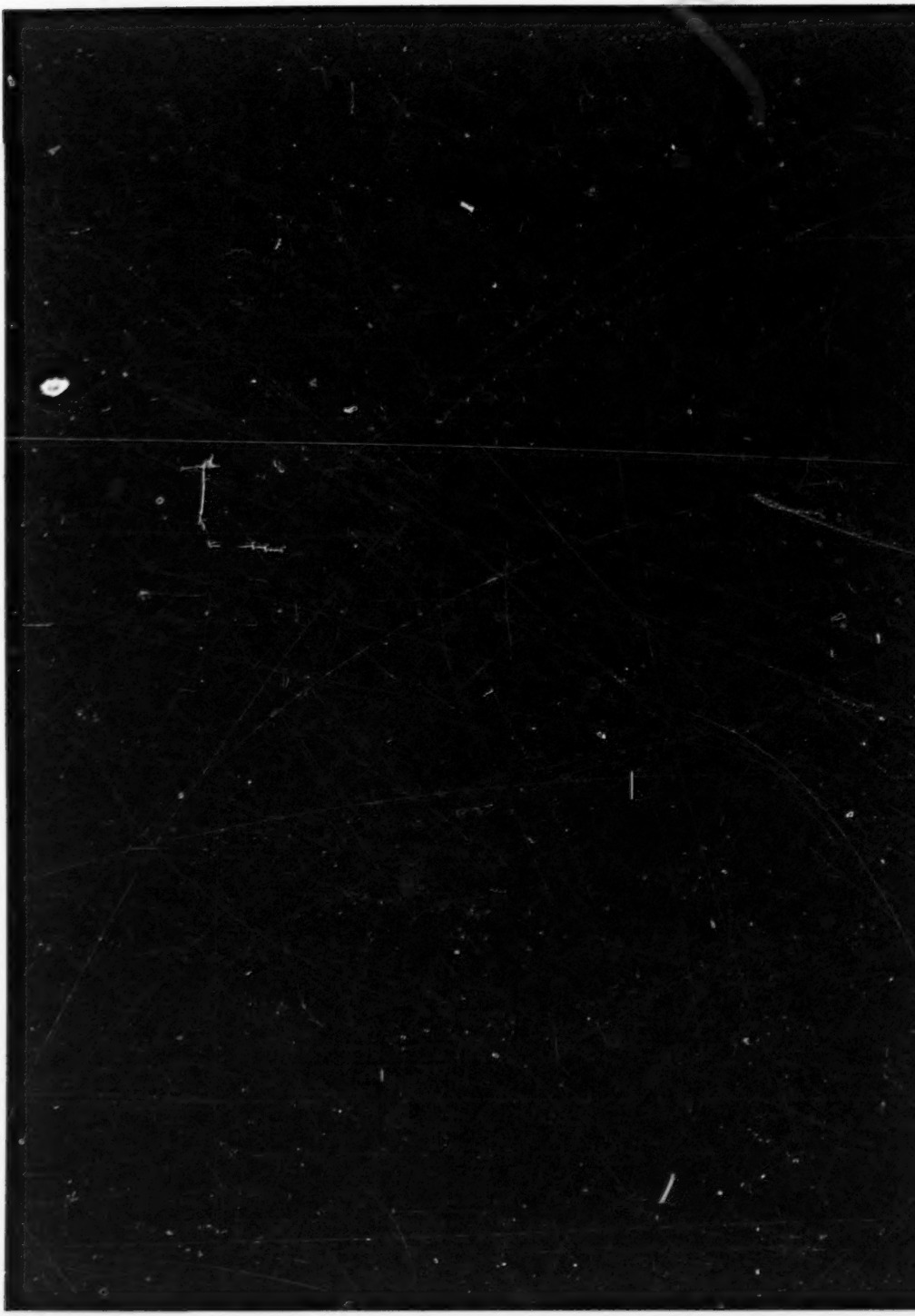

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1276

RICHARD B. COTTEN, PETITIONER

v.

JAMES R. SCHLESINGER, SECRETARY OF DEFENSE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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1. Petitioner, suing as taxpayer and citizen, brought this suit for injunctive and declaratory relief against the transfer of military materiel by the Secretary of Defense to the State of Israel.[1] Petitioner alleges that the sale of arms to Israel was "contrary to both statute and the constitution" (Pet. 4).[2]

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[1]William Pierce, the Committee to Restore the Constitution, Inc., and the Action Committee on Arab-American Relations also were plaintiffs in the district court. However, they did not appeal to the court of appeals from the dismissal of the complaint by the district court and, accordingly, they are not parties before this Court.

[2]The government argued in the district court that the transfer was authorized by 22 U.S.C. 2761, which provides:

> The President may sell defense articles from the stocks of the Department of Defense and defense services of the Department of

The district court dismissed the complaint, holding that petitioner lacked standing to maintain the action (Pet. App. A). The Court of Appeals for the Fourth Circuit affirmed *per curiam* (Pet. App. B).

2. Petitioner rather plainly lacks standing to sue. He has failed to meet the two-pronged test for taxpayer standing set out in *Flast* v. *Cohen*, 392 U.S. 83, 102-103, and reiterated in *United States* v. *Richardson*, 418 U.S. 166, 173, and *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208, 228. This test requires (1) a challenge to a law enacted under the taxing and spending clause, Article I, Section 8 of the Constitution, and (2) a claim that the law violates specific constitutional limitations imposed on the taxing and spending power. Petitioner makes neither allegation.

Nor has petitioner demonstrated the "personal stake in the outcome of the controversy" necessary to confer "citizen" standing. Petitioner has alleged no stake in the outcome of this case not shared by citizens in common. See, *e.g.*, *United States* v. *Richardson*, *supra*, 418 U.S. at 177-

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Defense to any friendly country or international organization if such country or international organization agrees to pay not less than the value thereof in United States dollars. Payment shall be made in advance or, as determined by the President to be in the best interests of the United States, within a reasonable period not to exceed one hundred and twenty days after the delivery of the defense articles or the rendering of the defense services.

Subsequent to the filing of the complaint, the Emergency Security Assistance Act of 1973, Pub. L. 93-199, 87 Stat. 836, which specifically authorizes $2,200,000,000 to be appropriated for "emergency military assistance or foreign military sales credits, or for both as the President may determine, for Israel," was enacted. The district court properly concluded that this law put to rest any question concerning the legality of the transfer of military materiel to Israel (Pet. App. 2a).

180; *Schlesinger* v. *Reservists to Stop the War, supra*, 418 U.S. at 226-227; *Baker* v. *Carr*, 369 U.S. 186, 204. Rather, as the district court noted, petitioner seeks to employ the judiciary as a forum "to vent the disagreement with the programs which are being conducted by the Congress" (Pet. App. 3a). This desire is not a basis for standing. *United States* v. *Richardson, supra*, 418 U.S. at 175; *Flast* v. *Cohen, supra*, 392 U.S. at 106.[3]

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.

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[3]Petitioner's contention that the district judge should have recused himself is without merit. The only ground alleged to show personal bias is the court's rulings against petitioner's position. Since the district court's decision is correct, it hardly demonstrates personal bias against petitioner.